# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>February 8, 2007 |
| v | No. 264597<br>Oakland Circuit Court |
| THOMAS WAYNE RUSSELL,<br><br>Defendant-Appellant. | LC No. 04-199751-FH |

Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions and sentences for one count of child sexually abusive activity, MCL 750.145c(2), one count of use of the internet to communicate with another to commit child sexually abusive activity, MCL 750.145d(2)(f), and three counts of use of the internet to communicate with another to distribute obscene matter to a minor, MCL 750.145d(2)(c). Defendant was sentenced to concurrent terms of 45 to 240 months' imprisonment for both his child sexually abusive activity and use of the internet to communicate with another to commit child sexually abusive activity convictions, and of 12 to 48 months' imprisonment for each count of use of the internet to communicate with another to distribute obscene matter to a minor. We affirm.

Defendant first argues that the trial court erred in denying his motion for a directed verdict. We disagree. Due process requires that a trial court direct a verdict of acquittal if the evidence is insufficient to support a conviction. MCR 6.419(A); *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998). "[I]t is not permissible for a trial court to determine the credibility of the witnesses in deciding a motion for a directed verdict of acquittal, no matter how inconsistent or vague that testimony might be." *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). Rather, it is for the trier of fact to determine issues of witness credibility. *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997), mod in part on other grounds 457 Mich 885 (1998). "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

MCL 750.145c(2) provides that "a person who arranges for, produces, makes, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, or

finance any child sexually abusive activity . . . is guilty of a felony . . . if that person knows, has reason to know, or should reasonably be expected to know that the child is a child . . . ." MCL 750.145c(2); *People v Cervi*, 270 Mich App 603, 624; 717 NW2d 356 (2006). Child sexually abusive activity means "a child engaging in a listed sexual act." MCL 750.145c(1)(l). A child is one who is under 18 years of age; a "listed sexual act" includes both "genital-genital" and "oral-genital" intercourse. MCL 750.145c(1)(b); MCL 750.145c(1)(h); MCL 750.145(c)(1)(p). Because mere preparation for child sexually abusive activity is sufficient to violate MCL 750.145c(2), the prosecution need only show that a defendant believed that the intended victim was a child to establish a violation of the statute. *People v Thousand*, 241 Mich App 102, 115-116; 614 NW2d 674 (2000), aff'd in part, rev'd in part on other grounds 465 Mich 149 (2001) (*Thousand I*).

The prosecutor presented sufficient evidence to establish that defendant prepared to engage in child sexually abusive activity. First, there are numerous references in the transcripts of chat sessions between defendant and "Kelly," the online persona of Special Agent Mike Ondejko, to "Kelly's" age, to "her" being a freshman in high school and to other things of interest to teen-age girls. And defendant admitted to police after his arrest that he had traveled to Novi to meet a 14-year old girl. Moreover, Ondejko specifically told defendant during their first chat and during subsequent chats that "Kelly" was a 14-year old girl. Therefore, a rational trier of could conclude that defendant believed he was dealing with a 14-year old girl.

Second, a rational trier of could conclude that defendant prepared to engage in sexually abusive activity with "Kelly". While chatting with "Kelly," defendant made numerous explicit lewd sexual references regarding his intention to engage in both oral and vaginal intercourse with "her." Defendant told "Kelly" that he would travel to Novi in a rental car from his home in the western part of the state to meet "her" and that they would then get a hotel room. Defendant also sent several nude pictures of himself over the internet to "Kelly," to which he also made lewd sexual references. Later, after defendant was arrested at Denny's, police found an overnight bag containing two condoms and personal lubricant in the truck defendant had rented. Defendant admitted to police that he had rented a hotel room and intended to engage in both oral and vaginal intercourse with "Kelly." Defendant also provided a written statement in which he admitted chatting with "Kelly" about participating in sexual acts. Thus, the jury could conclude that defendant prepared to engage in sexual activity with an individual he believed to be 14 years of age. Consequently, the prosecutor presented sufficient evidence to convict defendant of engaging in child sexually abusive activity. *Thousand I*, *supra* at 115-116.

Next, MCL 750.145d provides in relevant part:

> (1) A person shall not use the internet or a computer, computer program, computer network, or computer system to communicate with any person for the purpose of . . . :
>
> > (a) Committing, attempting to commit, conspiring to commit, or soliciting another person to commit conduct proscribed under section . . . 145c [child sexually abusive activity] . . . or . . .MCL 722.675 [distributing

> obscene matter to minors[1]], in which the victim or intended victim is a minor *or is believed by that person to be a minor*. (Emphasis added).

Defendant was charged with one count of violating MCL 750.145d arising from conduct proscribed by MCL 750.145c and three counts of violating MCL 750.145d arising from conduct proscribed by MCL 722.675. To establish a violation of MCL 750.145d premised on an underlying offense proscribed by MCL 750.145c, the prosecution must prove that defendant: (1) used the Internet or a computer to communicate with any person, (2) for the purpose of attempting to arrange for child sexually abusive activity, and (3) *with the belief that* the intended victim in the child sexually abusive activity was a minor. *Cervi*, *supra* at 624. To establish a violation of MCL 750.145d premised upon an underlying offense proscribed by MCL 722.675, the prosecution must prove that defendant: (1) used the Internet or computer; (2) with the intent to attempt to distribute sexually explicit matter to a minor; and (3) *with the belief that* the intended victim was a minor. *Cervi*, *supra* at 616.

Admittedly, defendant communicated with "Kelly" over the internet about his plan to rent a car to travel to Novi to meet "her" and to rent a hotel room to engage in both oral and vaginal intercourse with "her," believing "her" to be 14-years of age. Therefore, the prosecutor presented sufficient evidence to convict defendant of use of the internet to communicate with another to commit child sexually abusive activity. *Cervi*, *supra* at 624.

The prosecutor also presented sufficient evidence to convict defendant of three counts of use of the internet to communicate with another to distribute obscene matter to a minor.

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[1] MCL 722.675 provides in relevant part:

> (1) A person is guilty of distributing obscene matter to a minor if that person . . . :
>
> > (a) Knowingly disseminates to a minor sexually explicit visual or verbal material that is harmful to minors.
> >
> > * * *
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> (2) A person knowingly disseminates sexually explicit matter to a minor when the person knows both the nature of the matter and the status of the minor to whom the matter is disseminated.
>
> 3) A person knows the nature of matter if the person either is aware of the character and content of the matter or recklessly disregards circumstances suggesting the character and content of the matter.
>
> (4) A person knows the status of a minor if the person either is aware that the person to whom the dissemination is made is under 18 years of age or recklessly disregards a substantial risk that the person to whom the dissemination is made is under 18 years of age.

Defendant admittedly sent three separate pictures of a male with his genitals exposed to "Kelly" over the internet and then made sexual references about these pictures to "Kelly" while they were chatting online. Therefore, it is reasonable to infer that defendant was aware of the sexually explicit content of the three pictures. *People v Lang*, 250 Mich App 565, 576-577; 649 NW2d 102 (2002) (knowledge may be inferred from the surrounding circumstances and reasonable inferences arising from the evidence). Moreover, as noted above, defendant clearly believed that the person to whom he sent these pictures was only 14-years old. Therefore, sufficient evidence existed to show that defendant used the internet to knowingly send sexually explicit matter to a person he believed to be a minor. *Cervi*, *supra* at 616.

Defendant argues that it was impossible for him to have committed any crime because the prosecution failed to show that defendant's actions actually involved a 14-year old girl. However, our Supreme Court has squarely rejected this assertion in *People v Thousand*, 465 Mich 149, 165-166; 613 NW2d 694 (2001) *(Thousand II)*. Further, as noted above, MCL 750.145c(2) requires only mere *preparation* to engage in child sexually abusive activity; it does not require a showing of either actual abusive activity or the actual involvement of a minor. *Thousand I*, *supra* at 114-115. Similarly, MCL 750.145d only requires that defendant *believe* that the intended victim is a minor to establish a violation. *Cervi*, *supra* at 616. Therefore, defendant's argument fails. Moreover, defendant's assertion that he did not complete the offense of use of the internet to distribute obscene matter to a minor lacks merit. Given that use of the internet to commit distributing obscene matter to a minor requires only that defendant *attempt* to violate the underlying offense, it is irrelevant that "Kelly" was not actually a 14-year old girl; all that is necessary is that defendant believed and intended that his victim was a minor. *Thousand I*, *supra* at 165-166; *Cervi*, *supra* at 616.

Defendant next argues that the trial court improperly instructed the jury on the intent element of the charges against him. This Court reviews a claim of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). "A trial court is required to instruct the jury on the law applicable to the case and to present the case to the jury in a clear and understandable manner." *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001), aff'd 468 Mich 272 (2003). Accordingly, "[j]ury instructions must include all the elements of the charged offense and not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). A separate instruction regarding specific intent is unnecessary where the instructions concerning the elements of the offense contain instructions regarding specific intent. *People v Maynor*, 470 Mich 289, 296-297; 683 NW2d 565 (2004).

MCL 750.145c(2) specifically identifies the intent required to establish a violation, providing in relevant part, that a person violates that section "if the person knows, has reason to know, or should reasonably be expected to know that the child is a child." Similarly, MCL 750.145d(1) provides, in relevant part, that a person violates that section if the person uses the internet for the purpose of attempting to commit conduct proscribed by MCL 750.145c or MCL 722.675. The trial court included this intent language in its instructions to the jury pertaining to the charged offenses. Thus, no separate instruction on specific intent was required. *Maynor*, *supra* at 296-297; *Cervi*, *supra* at 617. Therefore, the instructions were proper. *Canales*, *supra* at 574.

Defendant also argues that the trial court erroneously scored 15 points for Offense Variable (OV) 10. We disagree. This Court reviews a trial court's scoring of a sentencing variable to determine whether the trial court abused its discretion and whether the evidence of record supports the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "'Scoring decisions for which there is any evidence in support will be upheld.'" *Id*., quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). When imposing a sentence, the trial court must apply the appropriate guideline scoring range. MCL 769.34(2); *People v Hegwood*, 465 Mich 432, 438-439; 636 NW2d 127 (2001). A trial court's sentence may be invalid if it is based on a "misconception of the law" or "inaccurate information." MCL 769.34(10); *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

OV 10 scores points for "[e]xploitation of a vulnerable victim." MCL 777.40. OV 10 is scored at 15 points for "[p]redatory conduct," defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(1)(a). MCL 777.40(3)(a). Here, defendant, who believed he was dealing with a 14-year old girl named "Kelly," indicated that he wanted to take "Kelly" to "someplace where you aren't going to run into people you know," and told "Kelly" to "save . . . skipping [school] for when I come to see you." Defendant also admitted to police that he had planned to take "Kelly" to a hotel in Canton until 3:30 p.m., at which time he thought "she" would have to be home. Further, defendant's intention to engage in sexual activity with "Kelly" was clear from both his online chats with "her" and his admissions to police, as well as Ondejko's discovery of condoms and personal lubricant in defendant's rental truck at the time of defendant's arrest. Therefore, the evidence demonstrates that defendant arranged for a situation in which he could engage in sexual activity with "Kelly" at times and places where "Kelly" would be isolated and secluded, and thus, vulnerable. Given that the timing and location of a sexual assault are relevant factors in assessing preoffense predatory conduct, *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003), the trial court did not abuse its discretion in assessing 15 points for OV 10.

Defendant also argues that the scoring of the guidelines was erroneous because the court engaged in improper judicial fact finding. We disagree. This Court reviews this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999); *People v Sexton*, 250 Mich App 211, 228; 646 NW2d 875 (2002). The United States Supreme Court has held that it is a violation of the Sixth Amendment for a trial court to increase a defendant's sentence beyond the maximum sentence permitted by law on the basis of facts found by the court rather than the jury. *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, Michigan's sentencing scheme is unaffected by *Blakely* because Michigan uses an indeterminate sentencing scheme in which the trial court sets the minimum sentence but can never exceed the statutory maximum sentence. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14 (Taylor, J), 732 (Corrigan, CJ), 741 (Cavanaugh, J), 744 n 1 (Young, J); 684 NW2d 278 (2004). Thus, "[a]s long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Drohan*, *supra* at 164.

Here, the maximum sentence for child sexually abusive activity is 20 years (or 240 months). MCL 750.145c(2); *People v Hill*, 269 Mich App 505, 509; 715 NW2d 301 (2006). The trial court sentenced defendant to 45 to 240 months for this conviction, based in part on the

score of 15 points for OV 10. Therefore, defendant's sentence was proper. *Drohan*, *supra* at 164.

Defendant argues further that the trial court's failure to depart downward from the guidelines and consider his rehabilitative potential constituted cruel and unusual punishment. We disagree.

Absent an error in the scoring or reliance on inaccurate information in determining the sentence, this Court must affirm a sentence within the applicable guidelines range. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Moreover, a sentence that falls within the guidelines range is presumptively proportionate and does not constitute cruel and unusual punishment. *People v McLaughlin*, 258 Mich App 635, 669-671; 672 NW2d 860 (2003); *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002). Defendant's sentences[2] fell within the appropriate scoring range, and defendant has failed to establish any scoring errors or that the trial court relied on inaccurate information[3] in determining his sentences. Therefore, this Court must affirm defendant's sentences, which were not excessive and did not constitute cruel and unusual punishment. *Kimble*, *supra* at 310-311; *McLaughlin*, *supra* at 669-671; *Colon*, *supra* at 66.

Finally, defendant claims that the trial court's jury instructions and his sentences violated his Ninth Amendment rights. However, defendant fails to explain how these rights were violated, other than to assert that the Ninth Amendment protects his inherent liberty interests. Therefore, we decline to address this issue. See *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001).

We affirm.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Brian K. Zahra

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[2] Defendant challenges the propriety of his sentences for both child sexually abusive activity and use of the internet to distribute obscene matter to a minor. However, we only look to the highest class felony (here, the Class B felony of child sexually abusive activity) in reviewing the scoring of the guidelines where a defendant is sentenced for multiple concurrent convictions. See MCL 771.14(2)(e)(i) and (ii); MCL 777.16g. See also *People v Mack*, 265 Mich App 122, 127; 695 NW2d 342 (2005) (where a defendant is sentenced for multiple concurrent convictions, a PSIR need only be prepared for the highest crime class felony conviction).

[3] Although defendant states that his sentences were based on inaccurate and incomplete information, he does not identify the information he believes to be inaccurate or incomplete. An appellant may not simply announce a position or assert an error and leave it to this Court to discover and rationalize the basis for his claims. Thus, defendant's failure to adequately explain his assertion constitutes abandonment of this issue on appeal. See *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001).